No. 14,706

In the

United States Court of Appeals

For the Ninth Circuit

PACIFIC FAR EAST LINES, INC., a Corporation,

Appellant,

vs.

JOHN WILLIAMS,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the Northern District of California, Southern Division.

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JURISDICTION

Plaintiff and Appellee, John Williams, on October 29, 1952, was injured while working as a longshoreman on board the SS Fleetwood. He was in the employ of the West Coast Terminals, Incorporated, who, as an independent contractor, was loading cargo on the vessel for the operator, Pacific Far East Line, Inc. the defendant and appellant. The vessel was moored at Alameda reefer dock, Alameda. A few minutes after 1:00 AM of that day, Williams, when about to descend a ladder into the No. 5 hatch, slipped and fell into the hold causing injuies.

On October 27, 1953, suit was filed by Williams against Pacific Far East Line, Inc. in the United States District

Court for the Northern District of California, Southern Division for damages in excess of $3,000.00, exclusive of interest and costs, alleged to have resulted from the fall. The complaint alleged negligence on the part of the defendant and also unseaworthiness of the FLEETWOOD to be the proximate cause of his injuries. The right to recover damages was expressly based on the general maritime law. Appellee was a citizen of the State of California. Appellant is a citizen of the State of Delaware. The court below had jurisdiction because of diversity of citizenship under Section 1332 of Title 28 of the United States Code.

The case was tried before a jury, beginning November 8, 1954. At the close of plaintiff's case defendant moved for a directed verdict on the ground of insufficient evidence to warrant submission to a jury the questions of negligence or unseaworthiness raised by the evidence (283, 297).* It also moved for a directed verdict at the close of the case on the same grounds. Both motions were denied. On November 17 the jury returned a verdict for $35,500 and judgment was entered accordingly (20, 21). On November 26, 1954, defendant and appellant filed its motion for judgment notwithstanding the verdict and in the alternative for a new trial. This motion was heard December 3, 1954, and an order entered December 10 granting the motion with the privilege to plaintiff of remitting all damages over $28,000, upon the doing of which the motion would be denied (35). Plaintiff thereafter remitted all damages over $28,000. Thereafter, and within the time allowed by law, defendant (appellant) perfected this appeal. The jurisdiction of this Court is sustained by Sections 1291 and 1294 of Title 28 of the United States Code.

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*Otherwise unidentified Arabic numerals in parentheses are page references to the printed transcript.

CONCISE STATEMENT OF THE CASE

Williams returned with other members of the hold gang at 1 o'clock in the morning to lift the plugs off the forward section of No. 5 hatch in order to go below and resume the stowing of frozen cargo. He and another longshoreman went down the ladder at the forward end of the hatch a distance of a few feet to the top of the plugs to hook the cargo fall onto the key plug. When the plug had been hooked on he climbed up the ladder and went toward the offshore side of the vessel along the top of the hatch coaming. When the key plug had been lifted out of the way he immediately returned along the coaming to a point on the coaming above the ladder, and when he had done so stepped back with one foot to descend the ladder. At that point he slipped and fell into the lower hold through the opening left by removal of the plug.

Plaintiff introduced some evidence designed to prove (1) that the light in the square of No. 5 where plaintiff was working was dim, and that this was brought about by (a) failure to provide sufficient lights in or above the square of the hatch where plaintiff was working and (b) failure of defendant to have on overhead or ceiling lights in the wings of No. 5 hold; and (2) that when the key plug was removed, leaving an opening of about 9 feet in length and 4 feet in width into the reefer hold, cold air in the hold contacting warmer air above caused moisture or frost to form on the coaming at about plug level, and more particularly on the steps of the ladder in No. 5 hatch above the plug level.

THE PLEADINGS

The complaint alleged that defendant was negligent in five respects, that the vessel was unseaworthy in the same five respects, and that plaintiff's injuries were proximately

caused by negligence of the defendant and unseaworthiness of the vessel. The defendant's answer denies negligence in all the respects charged and makes the same denials in respect to unseaworthiness. The answer alleges negligence on plaintiff's part proximately causing his injuries and also alleges that the injuries were caused by risks and hazards inherent in the work, and that plaintiff was aware of these risks and hazards and assumed them.

THE FORMAL ISSUES IN THE PLEADINGS

(1) Was there any negligence on the part of defendant which created working conditions not reasonably safe?

(2) Was the vessel unseaworthy?

(3) If a finding is warranted that there was negligence on the part of defendant, or unseaworthiness of the vessel, was either a proximate cause of the accident resulting in injury to the plaintiff?

(4) Was the accident and resulting injury due to risks or hazards of plaintiff's work on a reefer vessel, and more particularly in or about freeze hatches?

(5) Was the accident and resulting injury to Williams due to plaintiff's own negligence?

PRINCIPAL ISSUES OF FACT

The most important issues of fact raised by the evidence are the following:

(1) Was the light at the point where plaintiff slipped and started to fall insufficient?

(2) Would the overhead or ceiling lights in No. 5 hold, if on, have furnished any light on the top of the hatch coaming or even on the steps of the ladder above the hatch plugs in the forward part of the hold?

(3) In the short interval of time between the time when the key plug was lifted out and when Williams started to climb back into the square of the hatch, was any moisture or frost created on the top of the coaming where it appears plaintiff slipped and fell, or if he did not slip there, on any upper part of the ladder?

PRINCIPAL QUESTIONS OF LAW RAISED

1. If the ceiling lights in the 'tween deck hold were in fact off, did that constitute any unseaworthiness, considered in the light of the purpose for which those fixtures were intended and used, or actionable negligence on the part of defendant?

2. Did the furnishing by the ship operator of sufficient lights, and electricity to operate them, discharge its duty to the longshoremen in regard to lighting?

3. If there was insufficient light under the circumstances existing, was it a transitory condition for which the ship operator is not liable in the absence of notice and reasonable opportunity to correct?

4. Should the Court below have instructed the jury on the issues mentioned above as requested by appellee, and also as to

(a) whether the plaintiff was contributorily negligent in voluntarily proceeding into an area insufficiently lighted, and

(b) whether the risk of slipping on moisture or frost was an inherent and known risk or hazard of working in and about freezer compartments, and assumed by plaintiff?

5. Should the Court below have instructed the jury to disregard all evidence relating to the ceiling lights in the 'tween deck compartment?

SPECIFICATION OF ERRORS RELIED UPON

1. The Court below erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence sufficient to warrant submission to the jury that appellant negligently failed to provide appellee with a reasonably safe place to work, proximately causing injury to appellee.

2. The Court erred in denying appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict upon the ground that there was no evidence sufficient to warrant submission to the jury that appellant's vessel, the SS Fleetwood, was unseaworthy in any respect, proximately causing injury to appellee.

3. The Court below erred in denying appellant's requested instructions Nos. 4A, 4B, 7A and 7B which would have submitted to the jury the question of whether the conditions complained of by appellee in the area from which he fell were a basis for a finding of negligence or unseaworthiness under the "transitory" conditions rule. The requested instructions are set out in the printed record at pages 28, 29, 30 and 31 and are as follows:

No. 4A

> "If you shall find that the plaintiff was caused to fall by reason of lack of adequate lighting at the point from which he fell into the forward end of #5 hatch of the Fleetwood, that fact would not of itself warrant you in finding that the vessel was unseaworthy. To justify such a conclusion it must appear that the defendant knew of the inadequacy of the lighting at that point, or that it had existed such a length of time that in the exercise of ordinary care the defendant ought to have known of it and remedied it, and had thereafter unreasonably failed to furnish sufficient lighting for the work

being performed at the time; since the defendant is not liable for a mere transitory condition of such a character."

No. 4B

"If you find that plaintiff was caused to fall into the No. 5 hatch of the FLEETWOOD by reason of the presence of ice or frost on the place where the plaintiff was standing at the moment he fell, that fact would not of itself warrant you in finding that the vessel was unseaworthy. To justify such a conclusion, it must appear that the defendant knew of its presence and had unreasonably failed to remove it, or that it had been there such a length of time that in the exercise of ordinary care the defendant ought to have known of it and removed it, since the defendant is not liable for any transitory condition of such a character."

No. 7A

"If you find that the plaintiff was caused to fall by reason of lack of adequate lighting at the point from which he fell into the forward end of #5 hatch of the FLEETWOOD, that fact would not of itself warrant you in finding that the defendant was negligent. To justify such a conclusion it must appear that the defendant knew of the inadequacy of the lighting at that point, or that it had existed such a length of time that in the exercise of ordinary care the defendant ought to have known of it and remedied it, and had thereafter unreasonably failed to furnish sufficient lighting for the work being performed at the time, since the defendant is not liable for a mere transitory condition of such a character."

No. 7B

"If you find that plaintiff was caused to fall into the #5 hatch of the FLEETWOOD by reason of the presence of ice or frost on the place where the plaintiff was standing at the moment he fell, that fact would not of

itself warrant you in finding that the defendant was negligent. To justify such a conclusion, it must appear that the defendant knew of its presence and had unreasonably failed to remove it, or that it had been there such a length of time that in the exercise of ordinary care the defendant ought to have known of it and removed it, since the defendant is not liable for any transitory condition of such a character."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instructions as follows (400):

"Mr. Waddell: Your Honor, these exceptions are made, I believe, under Rule 51, objections to failure to instruct as requested by counsel for defendant. The specific requested instructions that I refer to are the following, your Honor. Those instructions, and there are a total of four of them, which relate to the transitory nature of the unseaworthiness or the negligent or unsafe condition alleged by plaintiff. Those early instructions which, in effect, say that there is no liability for such a transitory condition."

4. The Court below erred in denying appellant's requested instruction No. 11A, which would have instructed the jury as to the extent of the ship operator's duty to furnish lighting equipment to stevedores. The requested instruction is set out in the printed record at page 32 and is as follows:

No. 11A

"If you find from the evidence that it is the custom for a ship operator to provide such lights as have been described as cargo lights in this case for the use of the stevedoring company in connection with loading operations, and particularly in connection with the work which was being done at the time plaintiff fell into the hold and also that it is the custom for the longshoremen

themselves to place such lights in such location or locations as they may deem proper to perform that work, then you are instructed that any failure on the part of the longshoremen to place the lights so that there was sufficient light to properly perform their work at the place involved does not constitute unseaworthiness of the vessel or negligence on the part of the defendant in this case, the steamship operator."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instruction as follows (401):

"Mr. Waddell: The other failure to instruct to which we object at this time deals with that instruction which places upon the stevedores the sole responsibility for placing of the lights, which are furnished by the vessel, and that any deficiency in lighting which results from the placing of such lights is not the liability of the steamship company."

5. The Court below erred in denying appellant's requested instructions Nos. 21A and 21B which would have submitted to the jury certain issues of contributory negligence. The requested instructions are set out in the printed record at pages 33 and 34 and are as follows:

No. 21A

"You are instructed that if you find that the plaintiff knowingly proceeded into an area which he could see was not sufficiently lighted he is guilty of contributory negligence, the degree of which is to be determined in the light of any circumstances which induced such action on his part."

No. 21B

"You are instructed that if the plaintiff knowingly proceeded into an area which he could see was insuffi-

ciently lighted, he must use such care in so proceeding as a reasonably prudent man would exercise under like conditions and failure so to do would be contributory negligence on the part of plaintiff."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instructions as follows (400, 401):

"Further exception is made to the failure to give two instructions relating to the subject of contributory negligence, and with particular reference to the effect on contributory negligence of the plaintiff intentionally proceeding into an area which he knew to be dark. There are two such instructions."

6. The Court below erred in denying appellant's requested instruction No. 26A which would have submitted to the jury the question of whether the danger of slipping on ice or frost is an inherent risk and hazard of working in and about freeze compartments of refrigerator vessels. The requested instruction is set out in the printed record, page 34, and is as follows:

No. 26A

"You are instructed that there are certain risks and hazards that are inherent in the occupation of working as a longshoreman in or about a freeze hatch on a refrigerator ship, and, if you find from the evidence that one of these is the risk and hazard of slipping on ice or frost that is sometimes found in or about a freeze hatch and that plaintiff's fall resulted solely from his slipping on such ice or frost, then his fall was the result of such inherent risk or hazard, and your verdict must be for defendant."

At the trial exceptions as required by Rule 51 of the Federal Rules of Civil Procedure were made to the failure to give the requested instruction as follows (401):

"The last failure to instruct which we note at this time is a requested instruction to the effect that the presence of ice or frost in expectable places in the vicinity of a freezer hatch is a risk or hazard inherent in the occupation of a longshoreman working in such a freezer hatch. Those are the instructions. They have already been submitted to your Honor at an earlier time."

7. The Court below erred in denying appellant's request and motion to the Court to instruct the jury to disregard testimony in the record regarding the lights in the ceiling of 'tween deck in determining the unseaworthiness of the vessel or the negligence of defendant for the reason that there was no substantial evidence that any lack of such lights was a proximate cause of the accident. This motion was made orally at the conclusion of the case. The full transcript thereof is as follows (378):

"Mr. Cooper: I want to make this motion for the record. We move the Court to have the jury instructed, or directed, rather, to disregard testimony in determining whether a vessel is unseaworthy or the defendant negligent, in respect to ceiling lights in the hold, for the reason that there is no substantial testimony which would warrant submitting that to the jury, to the effect that such lack of lights, if there were such, was a proximate cause of the accident.

The Court: Well, you are asking the Court to give such an instruction?

Mr. Cooper: Yes.

The Court: All right, I will not give such an instruction."

FULL STATEMENT OF FACTS

The Fleetwood is a reefer vessel and frozen cargo was being loaded by West Coast Stevedoring Company into No.

Williams was familiar with reefer vessels, having worked on them before during his fifteen years as a longshoreman on the San Francisco Waterfront. He had climbed down ladder in and out of the hold several times that night using the ladder involved because the hold men only stayed below one half hour. Other members of the hold gang did the same thing an equal number of times.

It is customary practice for a vessel which is coming into port to lay out cargo lights, three or more in number at each hatch, to be used by the stevedoring company in handling cargo. These lights are often plugged in, but if they are not, there are sockets where they can be plugged in. Thereafter, they are used in a manner determined by the stevedoring company to suit their own ideas. Such lights were available at the time the gang went to work 7:00 o'clock in the evening, and were available at the time of the mishap. When No. 5 hatch was opened up at 7:00 o'clock, three cargo lights were lowered by the longshoremen into the hold where the men were working cargo in order to provide sufficient light in the square of the hatch. These were hung at three corners of the hatch, two of them being lowered quite far down, and one of them being secured along the coaming at the inshore forward corner of the hatch. Before the hatch plugs were put in place at about 12:00 o'clock midnight, the cargo lights were of necessity pulled up out of the hold and placed on deck; one, and probably two, on the winch platform which is immediately aft of the hatch. That platform is 8¾ inches below the top of the hatch coaming. They were left lighted. If more light was desired by the longshoremen, a light was sometimes held by one of them and directed into the square of the hatch where the men were hooking on. On other occasions, a light was secured to the guard rail on the offshore side of the hatch where it would not be struck by a

plug being lifted up and swung inshore. The distance from the top level of the plugs to the top guard rail running along the forward part of the hatch in front of the winchdriver is almost 6 feet. The vessel was equipped with the customary flood lights on the king posts some 20 or 25 feet above the deck, but the light from those lights was cut off to a large extent because of the presence of what is commonly known as a Seattle hatch tent. This is a tent usually set over reefer hatches while the hatch is open to prevent, to some extent, warm air coming in contact with the cold air of the hold and thus reducing the temperature of the hold. In order for the cargo runner to move back and forth, such tents have and this one had a slot at the peak. On the offshore side, this slot was a few inches in width, and widened toward the onshore side until it was about two feet wide. The tent was entirely open on the dock side of the ship so that it made an inverted V. There were dock lights along the dock shed where the vessel was docked which furnished a little light to the area. And as indicated there was some light which came through the slot from the flood lights above deck.

The stevedoring company was in complete charge of the method of doing the work, and consequently arranged the cargo booms, the falls and the lights for the doing of their work, and to suit their own ideas.

There was not any evidence of any complaint voiced by any longshoreman that the light conditions, which prevailed, were insufficient or unsafe for the conduct of the work. Williams himself made none and heard none.

In the 'tween deck hold there were what is often described as overhead or ceiling lights. The purpose of these was to furnish light for the longshoremen for stowing in the wings and forward and after portions of the hatch, which were not within or near the square of the hatch; and they were so

used. These were small, about 60 watt, permanent lights installed at 10 foot intervals, 4 on each side of the hatch back in the wings in the ceiling of the 'tween deck. These lights were in a cylindrical solid fixture, the lower edge of which extended beyond the lower part of the electric bulb or globe inside; and, had at the bottom a solid, heavy piece of colored glass over which there were cross bars of iron. See Ex. A. The purpose, and use to which they were put, was to furnish light to facilitate the work of longshoremen working in the wings and forward and after portions of the hatch. There is some testimony that these lights were not on. And there is some testimony that they were usually turned off when the plugs were put on and the blowers to circulate cold air in the holds put on; and, that they were turned on again when the blowers were turned off when the longshoremen again went into the hold to resume work. At the time of the mishap, none of the longshoremen had returned to the hold, and consequently no work of stowing cargo had commenced.

Plaintiff sought to have the inference drawn that if these lights had been on, if in fact they were not, there would have been enough light thrown upward through the small space created by the removal of the key plug to have indicated the condition of the hatch coaming on which they contended plaintiff slipped; and as to the condition of the coaming plaintiff sought to prove that when the key plug was lifted out, the cold air caused moisture or frost or both to form on some part of the coaming and plaintiff to slip and fall.

ARGUMENT

I.

The Evidence Was Insufficient to Warrant Submission of the Case to the Jury on the Points Which Plaintiff Had the Burden of Proving in Order to Make Out a Case, and the Trial Court Erred in Failing to Grant Defendant's Motion for a Directed Verdict at the Close of the Case and for the Same Reason Committed Error in Denying Defendant's Motion to Enter Judgment for Defendant Notwithstanding the Verdict.

The rule in respect to sufficiency of evidence established by the Supreme Court of the United States and recognized by this Court in the case of *Butte Copper & Zinc Co. v. Amerman, et al.*, 157 F.2d 457 (9th Cir. 1946), is that there must be substantial relevant evidence to support the verdict. And, substantial evidence is defined by the Supreme Court in the case of *Edison Co. v. Labor Board*, 305 U.S. 197, 229, 83 L.Ed. 126 (1938), as follows:

> "Substantial evidence is more than a mere scintilla, it means *such relevant evidence as a reasonable mind* might accept as *adequate* to support a conclusion."*

There was not such relevant evidence in this case.

A. The Evidence Shows That Plaintiff Slipped When He Had One Foot On the Hatch Coaming and Was Stepping Down With the Other to Go Down the Ladder Leading Into No. 5 Hatch.

It is essential at the outset that it be determined where Williams was when he stepped back and commenced to fall, because without that it would not be possible to determine whether there was sufficient light to make the place reasonably safe or whether there was any moisture or frost which had been, or could have been, deposited at such place.

No one saw Williams when he started to fall. Consequently the only direct testimony as to where he was when

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*Emphasis added throughout the brief unless otherwise indicated.

the fall commenced is that given by Williams himself. The pertinent parts of his testimony are as follows:

"Q. You mean, then, before it [key plug] was lifted out, you climbed up this ladder, you call it?

A. Sure.

Q. And then went— —

A. Walked around.

Q. I see. Climbed up the ladder and walked around?

A. Sure.

Q. And then the winchdriver lifted the plug out, is that right?

A. Sure.

Q. Actually where did you go? You said you walked around; tell us where you went?

A. To my remembrance, I think I went on the offshore side.

Q. You think you went to the offshore side?

A. I think, I'm almost sure I did, because the plugs go on the inshore side." (70)

* * * * * * *

"Q. Mr. Williams, you said a moment ago that you had gone out of the hatch up on deck after you helped hook up the plug?

A. That's right.

Q. What did you do after that?

A. *That is my last remembrance, is when I started back down to hook up the next plug.* When I fell through there, of course, I was unconscious four or five days; the rest of that I really don't remember." (43)

* * * * * * *

"Q. Did you use the ladder to go out?

A. Sure.

Q. Used the ladder to go out. And then is this correct, then, that after the winchdriver had removed the plug and swung it out of the way, then you started to climb back?

A. Yes." (58)

"Q. This is the rail you are talking about, you started over that rail?

A. Yes, over this one.

Q. You mean the second rail?

A. Over the top rail, the one upon the top.

Q. Well, the one that isn't shown in No. 2?

A. Yes, that's right.

Q. And this is the one you are talking about, which is shown in—I mean, shown in No. 3, which is shown in No. 2, is that correct?

A. That's correct.

Q. So you started over that?

A. Sure.

Q. And then something happened?

A. Sure.

Q. And that's all you remember, is that correct?

A. And I come over, my foots, *I stepped down*, I remember slipping. The rest of it I don't remember no more. (59)

* * * * * * *

Q. That is the way you did. Which is the hatch coaming which—which has been marked on defendant's Exhibit No. 2 as "Coaming"—that is where you walked along, right along here, is that right?

A. Sure.

Q. Right along. *Except you walked from offshore toward the inshore side, until you got to the ladder, is that right?*

A. Sure." (71)

Because of the wide variance between the testimony given by Williams at the trial and that given by deposition taken December 8, 1953, certain portions of his deposition were read. However, Williams was consistent at all times as to the point he had reached at the time he slipped and fell.

The following testimony in the deposition was read by counsel for the appellant:

"Q. Now you say at the time you fell, you had one foot on this, what do you call it?

A. On that, yes, on the coaming.

Q. On the coaming?

A. Yes, sir.

Q. I see. And the other foot was where?

A. Getting off, where I was getting off, just like (indicating)—

Q. You stepped back with the other foot, is that right?

A. You have to step back." (253)

The testimony set forth below was read by counsel for appellee:

"Q. I see. Now correct me if I am wrong. Your foot was somewhere along this hatch coaming (indicating)?

A. Yes, sir.

* * * * * * *

[Q.] And at that moment you fell?

A. Sure.

Q. And at that time you had your back toward the hatch?

A. That is the only way to get off." (255)

That the fall of Williams started high up is corroborated to some extent by the testimony of Ray Stewart, another longshoreman, who, with his partner, had just unhooked the key plug after it had been landed on the deck of the vessel on the inshore side of the No. 5 hatch. He was not looking in the direction of the hatch but heard someone holler and upon looking around saw a dark object fall in the hatch, which he indicated was in the vicinity of where the long bars are in the ladder leading into No. 5 hold. (See photograph, Plaintiff's Exhibit 6F) His reference, of course, could only be to bars in the ladder. His testimony was in part as follows:

"Q. (By Mr. Cooper): So then you have located it for us as near as you can where you saw the dark object falling, right here, is that correct?

A. Yes, somewhere in that vicinity.

Q. Where you have this bar, where these bars are indicated, which are really steps on the ladder, aren't they?

A. Yes, these are steps." (90)

There is not any other evidence in the case bearing on this point. There can be no doubt therefore that one of Williams' feet was on the top of the hatch coaming and there is no indication his other foot had reached even the top rung of the ladder.

B. There Was Not Sufficient Testimony to Meet the Requirements of the Rule That the Light On the Hatch Coaming Was So Dim as to Render the Place Unsafe.

Under the well established rule in Maritime law, the place of work need only be reasonably safe. Therefore, if it is reasonably safe, it is not unsafe within the meaning of the law.

There is not any direct testimony to the effect that the light was insufficient where Williams was when he started to step back, i.e., on top of the coaming; only that it was dim down on top of the plugs. But there is testimony that the longshoremen had placed at least one light on the winchdriver's platform, which is described in the record as a 300 Watt Mogul-base lamp which did throw light on the forward section of the hatch coaming. That testimony was given by William J. Wines, the winchdriver. He was standing within about a foot of the place where Williams slipped. His testimony is as follows:

"Q. [By Mr. Cooper]: When you came back that night at 1 o'clock, who placed the lights for the hatch that night?"

"A. They were sitting there on deck, yes, since we come back from dinner." (314)

"Q. I see. And one of them was placed so we could see—

[Oh, this is continuing the answer.*]

And one of them was placed so we could see to put on the plugs, although I admit it was a little dim. It wasn't really shining down on the plugs, *it was shining over the hatch.* The hatch coaming is about 18 inches off the plugs.

Q. (By Mr. Cooper): That was your testimony, was it?

A. Yes, sir." (315)

* * * * * * *

That lights so placed would have such an effect in lighting the area is corroborated by chief mate Wishard in testifying as follows:

"Q. Yes. Now, and then you started to tell us that sometimes they put them on the rim. Now is that what you meant, on the rim?

A. That's what I mean.

Q. And when that happens, what effect does it have on the lighting of the plugs?

A. It would throw your light *over the top of the hatch coaming* and light up that area." (164)

The general inference that the light conditions were adequate may be drawn from the fact that no evidence was introduced to show that any longshoremen, including Williams, had complained of insufficiency of light. Mr. Williams testified (74) that he had made no complaint and heard none. Mr. Walsh, the longshore gang boss, testified (275) that he heard no complaint, and the same testimony was given by Mr. Wines, the winchdriver (322). Also, we

*Remark by counsel.

think it is of considerable significance in that connection that Mr. Kjellmann, who was acting as night mate on the night in question, testified as follows:

> "Q. I see. So do I understand from that, then, that it's left up to the longshoremen as to whether they have got enough lights or whether they haven't? Is that correct?
>
> A. That's their—yes, that's their lookout. If they ain't enough lights, they holler. They holler for more." (125)

Testimony of the plaintiff and that given by plaintiff's witnesses was directed to the point that there was not sufficient light at the top level of the plugs where plaintiff *had* been working. Even if it be admitted that there was enough evidence to warrant a finding by jury that the light was inadequate at that place, it would not be proof that there was insufficient light at the *top* of the hatch coaming approximately 2 feet 9 inches above (241).

C. There Is a Complete Failure of Testimony to Show That Moisture or Frost Was or Could Have Been Deposited at Any Point On the Hatch Coaming Above the Level of the Hatch Plugs, Much Less On Top of the Hatch Coaming Where Williams Slipped.

The relevant temperatures at the time of the mishap are undisputed. The temperature in the freeze hold, which is the space below the plugs, was 10 to 12 degrees Fahrenheit. The temperature in the air above the hatch was approximately 50 degrees.

There were experts called by each side who were in agreement that air is a very poor conductor of heat and that consequently heat would be transferred from one body of air to another or to any other body very slowly. The time within which the cold air from the freeze hatch had contact with the warmer air above, before Williams fell, was very short—

probably not more than a minute, and perhaps less. The time involved was only that necessary for the winchdriver to lift the plug out of position, swing it to the inshore side of the vessel, from ten to twenty feet away, where it was unhooked by two men and return it to a position more or less above the hatch.

It is a well-known physical phenomenon that moisture will be deposited on the surface of a cold object only when the temperature of warmer moisture-laden air is reduced to the dew point at the point of contact.

The part of the coaming which is involved in this case was above the level of the plugs and, of course, much warmer than the cold air in the freeze hold immediately below by some 40°. The physical factor necessary to produce moisture on the coaming and more particularly on the steps of the ladder was therefore lacking. Mr. Hotchkiss, plaintiff's expert, admitted the premise but drew the wrong conclusion (199).

Mr. Goedewaggen, who was called by defendant, made tests in No. 5 hatch on the Fleetwood under conditions of temperature substantially the same as those existing on the night of the accident, which showed the following:

The temperatures on the main deck of the vessel at five minutes after 1:00 A.M., two thermometers being used, were 56 and 57 degrees. They were then placed at approximately the level of the plugs and 15 minutes later they both read 48 degrees Fahrenheit. The key plug was then removed and the blowers put on; 18 minutes later the temperatures were 44½ and 45 degrees. The blowers were then turned off for a period of 15 minutes and the temperature raised to 47 degrees.

Thus, at no time, irrespective of whether the blowers within the hold were on or off, was there any substantial change in temperature, and at no time did the temperature

at the plug level fall below 44½ degrees (327, 328 and 329).

This data shows beyond any doubt whatsoever that there was no substantial cooling at or on the face of the hatch coaming over a period of 18 to 20 minutes because of contact with air coming out of the freeze hatch. It was not a case of warm air coming in contact with a cold body, but the reverse. There would, therefore, be no physical reason for claiming that any moisture would be deposited on the coaming or on the ladder or steps and no basis whatsoever for contending that there was any moisture deposited much less frost created on the hatch coaming, or more important, the rungs of the ladder which plaintiff might have stepped on.

D. There Was No Testimony Whatsoever to Show That If the So-Called Ceiling Lights Had Been On They Would Have Furnished Any Light Where Plaintiff Slipped or Even Any Light On the Steps of the Ladder Above the Plugs.

Mr. Goedewaggen, as already indicated, went on board the vessel and took temperatures. He also experimented with the ceiling lights on and off as to light conditions. His testimony was that there was no noticeable difference in the amount of light whether the ceiling lights were on or off. His testimony is as follows (331):

> "Q. (By Mr. Waddell): Mr. Goedewaggen, let me ask you this question, then. At the time that you were observing, as you testified, this area here and at the moment that the lights in the 'tween deck and lower hold were turned off, did you notice any difference whatsoever in the appearance of this area?
>
> A. No, I did not."

There is no contrary testimony in the record, i.e., that there was any observable difference as to the light in the square of the hatch at the plug level when the ceiling lights

were off as compared to when they were on. All the testimony produced by plaintiff did no more than raise a possible inference that if the ceiling lights had been on there would have been some light reflected upward and through the relatively small opening created by removal of the key plug. As already stated in this brief, the lights in question were very small, 60 watts, and as the testimony shows, there was only one light on each side more or less directly opposite the aperture created by the removal of the key plug. They were located a distance of several feet back under the wings, and because of the cylinder in which these lights were located, the light given off from them was directed almost straight down towards the floor of the hold. Furthermore, they were covered with heavy glass and metal bars, which would reduce the amount of light thrown by these small bulbs. Finally, any light which could possibly come out of the hold would not throw any light on the top of the coaming where it appears Williams was standing; or on any of the bars on which he would step in descending to the top level of plugs. All these bars which the longshoremen stepped on and held onto to go down into and to come out of the hold were recessed so that any small light from the hold would not light the top of these bars even if Williams could see them in descending. And, the light would be in Williams' eyes had he looked down. A person rarely, if ever, looks at his feet when descending a ladder, because he is facing the ladder in descending. And even if Williams had looked, he would not have been able to see the bars because of the already stated fact that they were recessed. Furthermore, Williams gave no testimony that he did look.

II.

The Argument Under the Points Above Shows That, for Reasons Almost Entirely Factual, the Court Should Have Entered Judgment for Defendant. It Will Now Be Shown That Under Principles of Established Law as Applied to Uncontradicted Evidence, There Was No Basis for a Finding of Unseaworthiness of Vessel or Negligent Failure of Defendant to Furnish Plaintiff a Safe Place In Which to Work.

1. THE FURNISHING BY THE SHIP OPERATOR OF AN ADEQUATE NUMBER OF LIGHTS IN GOOD CONDITION AND THE POWER TO OPERATE THEM FULFILLS ITS DUTY TO A LONGSHOREMAN RESPECTING ILLUMINATION.

Even if there were enough evidence to justify an inference by the jury that Williams fell as a result of a lack of illumination at the point from which he fell, there can be no liability on the part of this appellant because the uncontradicted evidence shows that all necessary equipment and electrical power to adequately light the area was furnished by it to the longshoremen.

It should be first pointed out that there was no evidence introduced to prove, and plaintiff did not contend, that there was any structural or similar defective condition of the vessel in or about hold No. 5. The contention made is that there was insufficient light at the time of the accident and that this factor proximately contributed to Williams' fall.

The evidence is uncontradicted that the defendant provided at least three large cargo lights for the use of longshoremen in lighting the area in and about No. 5 hatch. These were 300 Watt Mogul-base lights with reflectors. They were affixed to long insulated electric light cords, and there were sockets into which they could be plugged in the vicinity of No. 5 hatch. There is also uncontradicted testimony that it was the custom for the stevedore company, acting through their longshoremen, to place such lights to suit their own ideas as to necessity, as well as to spot the booms, arrange cargo falls, etc. (Wishard 166 and 169, Walsh 260, Kjell-

mann 125). And, as the statement of fact earlier set out shows, the longshoremen had used these lights to light the square of the hatch and also to furnish light lower down in the hold where cargo was being stowed. When the gang knocked off for the midnight recess, these cargo lights were hauled up out of the hold by longshoremen and placed in the vicinity of the hatch. At least one (and probably two) was placed on the winch platform, which is forward of the hatch; and all were left lighted, i.e. they were not unplugged. Further, there is uncontradicted testimony that where the reefer plugs are being put on or taken off and more light is needed in the hatch area to facilitate that work, they are either held by longshoremen and light directed down on to the plugs or affixed to the guardrails forward of the hatch on the offshore side for the same purpose. The testimony of chief mate Wishard in this respect is as follows (158 ff):

> "Q. No, the question I asked you was, were they [lights] available for lighting the plugs if deemed necessary by the longshoremen?
>
> A. Yes.
>
> Q. Are they ever used in lighting the plugs at the time you commence removing the plugs by the longshoremen?
>
> A. They are.
>
> Q. Will you tell us the different methods that are used in using, I mean, are adopted in using those floodlights to light the top of the plugs when men are removing them?'
>
> * * * * * * *
>
> A. All right. I have seen them sit flat on the winch platform, I have seen one longshoreman hold the light to throw the light on the plug, I have seen them turned on their rim and I have seen them—— (159)
>
> * * * * * * *
>
> "Q. Yes. Now, and then you started to tell us that sometimes they put them on the rim. Now is that what you meant, on the rim?

A. That's what I mean.

Q. And when that happens, what effect does it have on the lighting of the plugs?

A. It would throw your light over the top of the hatch coaming and light up that area.

Q. You are referring, then, to the occasion when it's on the winch platform?

A. Yes." (164)

* * * * * * *

"Q. I see. Did you ever see any of them use, handle the lights by hand?

A. Well, I think I already answered that question. I said that I have seen them hold them in their hands and shine the light down." (166)

Mr. Walsh, the gang boss testified as follows (272):

"Q. And will you tell us whether they are thereafter* ever used for the lighting of the hatch in the plugs when you are removing plugs?

A. Yes, they use them. Generally one fellow holds them or hangs them up.

Q. I see. Hangs them up. Where do you mean, on the railing or— —

* * * * * * *

A. One fellow would hold them here on the starboard side. That's out of the way of the plugs.

Q. That's out of the way of the plugs? Well, assume you hung them on the rail and didn't hold them; where would you put them?

A. On the starboard side.

Q. I see. Is that the offshore side?

A. Offshore side. See, the plugs go in— —" (273)

The testimony of Ray Stewart, a member of the longshore gang, is as follows:

"Q. That is called the winch platform. Sometimes you put the cargo light there, is that right?

A. Sometimes we do.

---

*After the cargo lights are pulled out of the hold and put on deck.

Q. Yes. And sometimes you hang it on the rail, isn't that right?

A. Yes." (98)

As indicated earlier in this brief, Williams, gang boss Walsh, and winchdriver Wines all testified without contradiction that no complaint was made about lighting. Nor was any demand for additional lights made. In any event, there can be no question but that one cargo light because of its size and design was amply sufficient to illuminate the top of the plugs and the square of the hatch. That a light could have been so used is proven by the fact that immediately after the mishap occurred a longshoreman picked up a light and shone it down in the hold where Williams had fallen.

Under these circumstances the recent holding of the Court of Appeals for the First Circuit in *O'Leary v. United States Line Company,* 215 Fed. 2d 708 (1st Cir. 1954) 1954 A.M.C. 1772, is strikingly in point. There the Court said (page 712) in affirming a judgment entered on a directed verdict for the defendant:

> "The hold was dangerous only because it was dark, and certainly there was nothing hidden about that danger. Thus any finding of the defendant's negligence must be predicated on a duty to light. But, under the arrangement with the master stevedore, and in accordance with the practice generally followed, the ship's duty was only to provide an adequate number of suitable lights, and the electric power to operate them (and, perhaps, to connect them), while it was the master stevedore's duty to request such lights as he thought were required and to place them where he thought they were needed. On the evidence it could not be found that the shipowner failed in the performance of its duty. That is to say, there is no evidence that suitable lights were not available on the ship in adequate quantity, or

that the lights supplied were defective, or that current was not continuously available to operate them."

The *O'Leary* case, supra, is the latest of a number of cases on the subject of the shipowner's duty with respect to furnishing lighting for longshoremen, all of which have stated or implied that the shipowner's obligation with respect to lighting is discharged when he furnishes to the longshoremen an adequate number of suitable lights and a supply of electric power to operate them.

The following cases recognize this rule:

Riley Admx. v. Aguilines, Inc., 290 N.Y. 402, 72 N.E. 2d 718 (1947), 1947 A.M.C. 1038;

Long v. Silver Line, 48 F.2d 151 (2d Cir. 1931), 1931 A.M.C. 991;

The Hindustan, 37 F.2d 932. (E.D. N.Y. 1930), 1930 A.M.C. 340, Aff'd per curiam 44 F.2d 1015 (2nd Cir. 1930), 1931 A.M.C. 270;

Goldberg v. United States, 91 F. Supp. 104 (E.D. N.Y. 1950), 1950 A.M.C. 1226;

In *Brabazon v. Belships Co.*, 202 F.2d 904, 909 (3d Cir. 1953), 1953 A.M.C. 737, the court set forth the question of shipowner's liability to an injured longshoreman for alleged failure to provide illumination in the following terms:

"If the ship did not have an adequate supply of such appliances in proper working order, this deficiency might well constitute unseaworthiness. * * * And omission to supply lights as requested by the contractor might well be actionable failure to make the place of working reasonably safe."

The court then determined that the shipowner was liable because there was evidence that the ship was requested from time to time on the evening of the accident to supply additional lights but failed to do so. The evidence is to the contrary in our case.

And in *Riley Admx. v. Agwilines, Inc.* (supra) the court described the shipowners duty to provide illumination as follows (1947 A.M.C. 1042):

> "The ship was equipped with ample facilities for supplying completely adequate light, and there were available to the longshoremen lights which could be and were let down on long cables to light the places where the men were working on the 'tween deck. These facts are not in dispute. The maritime law imposes no liability upon the vessel or its owner when a longshoreman employed in loading or discharging the vessel is injured because of the manner in which the longshoremen carry on the work or because of their failure to use appliances furnished for their use, including lights available for lighting the 'tween decks or other parts of the ship where the work is done. * * * The vessel must be seaworthy; its equipment and tackle and machinery must be in order, and if there be defects in such gear resulting in personal injuries the operator of the ship will be liable, not only to the members of the crew, but to stevedores as well (Seas Shipping Co. v. Sieracki, 328 U.S. 85, 1946 AMC 698). There were no such defects in this case, and the lights were at hand. They were tools furnished for use in the safe conduct of the work, and if not used the negligence was not that of the ship or its owner."

Judgment for plaintiff was reversed.

These cases dealing with the shipowner's duty to furnish adequate lighting equipment are similar to the large number of cases standing for the general proposition that where the ship operator has furnished adequate equipment and devices

for the safety of seamen it has discharged its duty to furnish a seaworthy vessel or a safe place to work, even though the seamen fail to utilize such devices and equipment. See, e.g., *Shields v. United States*, 175 F.2d 743 (3d Cir. 1949), 1949 A.M.C. 1355, *certiorari denied* 333 U.S. 899 (1949); *Larsson v. Coastwise (Pacific Far East) Line*, 181 F.2d 6 (9th Cir.), 1950 A.M.C. 769, *certiorari denied*, 340 U.S. 833 (1950); *Nelson v. United Fruit Co.*, 201 F.2d 47 (2nd Cir. 1952), 1953 A.M.C. 146; *Lieflander v. State Steamship Co.*, 149 Ore. 605, 42 P.2d 156 (1935), 1935 A.M.C. 559.

2. THE LIGHTS IN THE CEILING OF THE 'TWEEN DECK HOLD WERE NOT INTENDED OR USED FOR THE PURPOSE OF LIGHTING THE HATCH COAMING AREA. IF, THEREFORE, THEY IN FACT WERE NOT ON, THAT DOES NOT RENDER THE VESSEL UNSEAWORTHY.

The uncontradicted testimony is that the lights in the fixtures built into the ceiling of the 'tween decks were intended solely for use in lighting the hold to facilitate the stowing of cargo in the wings and in the forward and after sections, i.e., those parts of the hold which could not be adequately lighted by lowering the cargo lights into the hatch from above, and there is no evidence they were used for the purpose of lighting the hatch above the plug level. There is therefore no basis for any contention that the ship owner should have had them on, assuming that they were not on.

Mr. Kjellmann, who was an old ship's master, and was acting as night mate at the time testified in this regard as follows:

> "Q. (By Mr. Chandler): The lights I am referring to, I am sorry, the lights I am referring to are the lights down in the holds, these lights we have been talking about.
>
> A. There are lights down in the hold. *They don't need them until they get the hatch off, and come down*

to go to work. They wouldn't help them a bit to take the hatches off." (120)

* * * * * * *

"Q. (By Mr. Chandler): Have you observed, have you ever observed the lights down in the holds here providing light up on these steps when the key plug is removed?

A. No, I can't say that I have seen that, no, whether they shine up there or not, I don't—wouldn't be able to say that. I don't—I don't see how—they can't shine up too much anyhow." (121)

Mr. Wishard, the first mate, also testified to that effect:

"Q. What's the purpose of it, what's it used for?

A. Well, when they are stowing the cargo, it puts light down from the overhead, down on the deck, so that they can see.

Q. What part of the deck?

A. The gratings, in the wings.

Q. Yes. Well, I mean, does it put the light on the wings or in the center of the hatch or where?

A. In the wings." (177)

Chief engineer Maple testified as follows:

"A. That is the overhead fixture.

Q. I see. And the light is inside of this? I am showing you Defendant's Exhibit—is it marked?

The Clerk: It was marked 11. I will remark it.

Q. (By Mr. Cooper): That's the type of light. Will you tell us, if you know, what those lights were used for?"

"A. For lighting of the hold around the wings of the hatch.

Q. I see. Now, on what occasion?

A. While loading or discharging cargo." (351)

Mr. Walsh, the longshore gang boss, testified as follows:

"Q. Now, what are those lights that are in the

ceiling, in the wings of the ship, used for?

A. Well, they are deck lights to see underneath.

Q. I mean, they are used in connection with what work?

A. Stowing cargo." (274)

Unseaworthiness has been defined in the leading modern case on that subject, *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1943), as "inadequate for the purpose for which * * * ordinarily used."

See *Norris, The Law of Seamen,* Section 613.

In applying this concept of seaworthiness, this court has ruled that a beam across a hatch from which a seaman had fallen was not unseaworthy in not furnishing a safe footing where the beam "was not intended as a place to work." *Hunt v. Hobbs, Wall & Co.*, 42 F.2d 437 (9th Cir. 1930), 1930 A.M.C. 1390. And in *Holub v. Sword Line*, 132 F.2d 206 (5th Circ. 1942), 1943 A.M.C. 898, the court held that a cargo batten on which libelant was climbing was not unseaworthy when the rusty cleat holding it in place broke, since cargo battens were not intended to be used for climbing upon.

As has been shown earlier in this brief, there is no evidence in the record that the overhead lights in the 'tween decks, which certain witnesses testified were not burning at the time appellee fell, would have cast any effective light on the place from which he fell. But even if the jury were to be permitted to infer that some such illumination might have been cast on that area by those lights, the fact that such lights were not burning does not constitute an unseaworthiness because there is no evidence that those lights were intended or ever used for the purpose of lighting the area from which appellee fell.

To hold that a vessel can be unseaworthy because an appliance does not function properly for a purpose for which it was not intended to be used, would be a strange rule and without precedent. It would be just as sound to argue that the shipowner should be liable for injuries suffered by a person walking in a darkened deck area because a light, which when the Captain read at night usually shone through a porthole in his cabin and lighted the area to some extent, was not on at the time of the injury. The obvious answer to such an absurd contention is that the Captain's reading light is not intended or ordinarily used for the purpose of lighting the deck outside his porthole.

The Court, therefore, should at least have instructed the jury to disregard all testimony regarding the ceiling lights.

3. ANY INSUFFICIENCY OF LIGHTING AT THE PLACE FROM WHICH APPELLEE FELL IS, IN ANY EVENT, A "TRANSITORY" CONDITION WHOSE EXISTENCE DOES NOT CONSTITUTE AN UNSEAWORTHINESS OR A BASIS FOR A FINDING OF NEGLIGENCE.

Even if it be assumed that the illumination at the point from which Williams fell was inadequate for any reason, the evidence shows that insofar as the work involved was concerned that condition existed for an exceedingly short period of time—almost momentary. It was not of any importance until longshoremen began to remove the hatch plugs, and it affirmatively appears that the dim light condition could not have existed for more than about two minutes of working time requiring more light. There were several hatches on the vessel being worked and no one representing the ship was near this hatch.

The condition was transitory in the extreme and under an impressive line of modern authority a vessel owner is not liable, either under the theory of negligence or that of unseaworthiness, for injuries resulting from such transitory conditions.

Cookingham v. United States, 184 F.2d 213 (3d Cir.), 1950 A.M.C. 1793, *cert. denied,* 340 U.S. 935 (1950);

Shannon v. Union Barge Lines, 194 F.2d 584 (3d Cir.) 1952 A.M.C. 686, *cert. denied* U.S. 846 (1952);

Adamowski v. Gulf Oil Co., 197 F.2d 523 (3d Cir. 1952), 1952 A.M.C. 1221, *affirming* 93 F. Supp. 115 (E.D. Pa. 1950), 1950 A.M.C. 2079; *cert. denied* 343 U.S. 906 (1952);

Boyce v. Seas Shipping Co., 152 F.2d 658 (2d Cir. 1945), 1946 A.M.C. 45;

Daniels v. Pacific-Atlantic S.S. Co., 120 F. Supp. 96 (E.D. N.Y. 1954), 1954 A.M.C. 806;

Haun v. Pope & Talbot, Inc., 99 F. Supp. 226 (E.D. Pa. 1951), 1951 A.M.C., *modified on other grounds* 198 F.2d 800 (3d Cir. 1952), 1952 A.M.C. 1708, *as modified, aff'd* 346 U.S. 406 (1953), 1954 A.M.C. 1;

Holliday v. Pacific-Atlantic S.S. Co., 99 F. Supp. 173 (D. Del. 1951), *rev'd on other grounds* 197 F.2d 610 (3d Cir. 1952), *cert. denied* 345 U.S. 922 (1953);

Stolper v. U. S. A. (E.D. Pa. 1950), 1950 A.M.C. 551;

Pietrzak v. Dollar Steamship Lines, 31 Cal. App. 2d 584, 88 P.2d 783 (1939), 1939 A.M.C. 1281;

Gladstone v. Matson Navigation Co., 124 Cal. App. 2d 493, 269 P.2d 132 (1954), 1954 A.M.C. 1004;

Blodow v. Pan-Pacific Fisheries, Inc., 128 Cal. App. 2d 428, 275 P.2d 795 (1954).

The majority of these cases have dealt with the presence of foreign substances on deck or passageway. It is difficult to conceive, however, of a condition more appropriately described as "transitory" than one having to do with light; and, the courts have had occasion to apply the rule to cases of claimed insufficiencies of lighting.

In *Adamowski v. Gulf Oil Co., supra,* the Court of Appeals for the Third Circuit affirmed the granting of defendant's motion for judgment notwithstanding the verdict on the grounds that the alleged foreign substance and lack of light in the passageway in which plaintiff was injured was not shown to be other than transitory. See, also, *Hawn v. Pope & Talbot, Inc., supra,* and *Crawford v. Pope & Talbot, Inc.,* 206 F.2d 784 (3d Cir. 1953), 1953 A.M.C. 1799.

The principle of the *Cookingham* case, supra, has been applied in the Northern District of California (*Garrison v. United States,* 121 F. Supp. 617 (N.D. Calif. 1954), 1954 A.M.C. 697) and the case has been cited with approval by the Court of Appeals for the 9th Circuit (*Freitas v. Pacific-Atlantic Steamship Company,* 218 F.2d 562, (9th Cir. 1955), 1955 A.M.C. 649).

III.

The Court Below Erred In Refusing to Give Instructions Nos. 4A, 4B, 7A and 7B Dealing with the Subject of "Transitory" Conditions as Requested by Appellee.

The requested instructions are set forth in full at pages 6 to 8 of this brief. The failure to give such instructions was plainly prejudicial error, since without them a jury could conclude that any insufficiency of lighting or any wet or frosty condition on or about the hatch coaming could create an unseaworthiness or a basis for a holding of negligence in failing to furnish a safe place to work. Under the cases cited in paragraph 3 of the preceding section of this brief such a conclusion would be contrary to law.

In *Gladstone v. Matson Navigation Co., supra,* a judgment for the plaintiff was reversed because of the failure to give instructions almost identical to those requested by appellee in this case.

In *Guerrini v. United States*, 167 F.2d 352 (2d Cir. 1948) 1948 A.M.C. 724, *cert. denied* 335 U.S. 843 (1948), Judge Learned Hand reversed a judgment for the libelant and remanded the case to the District Court for a specific finding on the issue of how long a patch of grease had remained on the deck prior to libelant's injury.

IV.

The Court Below Erred In Refusing to Give Instruction No. 11A Dealing with the Ship Operator's Obligation to Furnish Lights

The requested instruction is set forth in full at pages 8 and 9 of this brief. The failure to give the requested instruction was prejudicial error since, in the absence thereof, a jury might conclude that the ship operator had a continuing duty to furnish illumination as needed by the longshoremen during the conduct of their various tasks. Under the cases cited in paragraph 1 of the preceding section of this brief such a conclusion would be contrary to law.

In *O'Leary v. United States Line Co., supra*, the Court held that where the evidence showed a ship operator to have furnished adequate lights and electric power to operate them a verdict for defendant was properly directed.

V.

The Court Below Erred In Refusing to Give Instructions Nos. 21A and 21B Dealing with the Subject of Contributory Negligence as Requested by Appellee.

The requested instructions are set forth in full at pages 9 and 10 of this brief. Since the appellee admittedly proceeded into an area which he claims was insufficiently lighted, and since the cause and extent of the claimed insufficiency of lighting is the heart of appellee's case, the jury should not have been left with a mere general instruction on the subject of contributory negligence. The authorities

which have considered the question are in agreement that, unless caused by unusual circumstances, proceeding into a darkened area constitutes contributory negligence in some degree and requires the person so proceeding to use such care as the circumstances require. *Read v. United States,* 201 F.2d 758 (3d Cir. 1953), 1953 A.M.C. 314, and *Dervishoglu v. Boyazides,* 44 F. Supp. 385 (E.D. N.Y. 1942), 1942 A.M.C. 556.

VI.

The Court Below Erred In Refusing to Give Instruction No. 26A Dealing with the Subject of Inherent Risks and Hazards of Plaintiff's Employment as Requested by Appellee.

The requested instruction is set forth in full on page 10 of this brief. The failure to give such instruction constituted prejudicial error since, without it, a jury could conclude that there are, in law, no risks and hazards of working in and about freezer compartments on ships which, in the absence of other circumstances of negligence or unseaworthiness, are inherent in the task and which are assumed by the employe. The courts, however, have held that there are such risks and hazards applicable to suits by seamen for personal injuries. *Lake v. Standard Fruit & Steamship Co.,* 185 F.2d 354 (2d Cir. 1950), 1951 A.M.C. 71 and *The Cricket,* 71 F.2d 61 (9th Cir. 1934), 1934 A.M.C. 1035. There is more reason, if necessary, for applying the rule to longshoremen who are really shore workers.

It seems more likely that if plaintiff's fall was due to anything other than his own negligence, that it was caused by an inherent risk or hazard connected with the work, and the court should have given this instruction to the jury. It was necessary for all the longshoremen, including Williams, to climb in and out of the freeze hold a number of times

during the evening (the gang was changed every half hour). In doing so they necessarily came out of an area which was frozen tight into one many degrees above freezing, the lower half of the ladder being in the freeze hold and the upper half being above the plugs.

And Williams was not only thoroughly familiar with conditions on the FLEETWOOD, but with those on other reefer vessels where he had worked. Further, in the few minutes preceding the mishap, he had been down the ladder and up again, which involved using the top of the hatch coaming where he later slipped. Irrespective of whether there was any moisture at the time in question, there surely must have been times when the men came out of the freeze hatch, some of the rungs of the ladder would become moist from the soles of their shoes.

VII.

The Court Below Erred In Denying Appellant's Request and Motion to Instruct the Jury to Disregard Testimony In the Record Regarding the Lights In the Ceiling of the 'Tween Deck.

The full transcript of appellant's motion is set forth at page 11 of this brief. The failure to grant the motion and instruct the jury accordingly was prejudicial error, since it permitted the jury to infer that such evidence was relevant and material and that the alleged fact that such lights were not on at the time of the mishap could be a basis for a finding of unseaworthiness on the part of appellant or a negligent failure to furnish a safe place to work. These issues have been discussed in other portions of this brief and only a brief summary of the objectionable character of such evidence will be given here.

Evidence relating to the overhead or ceiling lights in the 'tween deck was irrelevant because appellee had failed to

establish by the required quantum of evidence that these lights would have had any effect in illuminating the place from which plaintiff fell. The evidence requested to be stricken is irrelevant because the record shows without contradiction that adequate cargo lights and the power to operate them were furnished by appellant. The evidence requested to be stricken is irrelevant because it affirmatively appears in the record that those lights were not intended or used for the purpose of lighting the area from which plaintiff fell and thus their not being on cannot constitute an unseaworthiness. And, finally, the evidence requested to be stricken is irrelevant because any lack of illumination at the place from which plaintiff fell which might have resulted from those lights being off at the moment when plaintiff fell was a transitory condition for which appellant is not liable under the authorities cited above.

CONCLUSION

For the reasons shown, the judgment should be reversed. But if this Court rules otherwise, a new trial should be ordered because of prejudicial errors committed by the trial court. And, in the latter event, it is earnestly requested that this Court indicate for the trial court's guidance that the evidence in regard to the overhead or ceiling lights should not have been received.

Respectfully submitted,

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George L. Waddell
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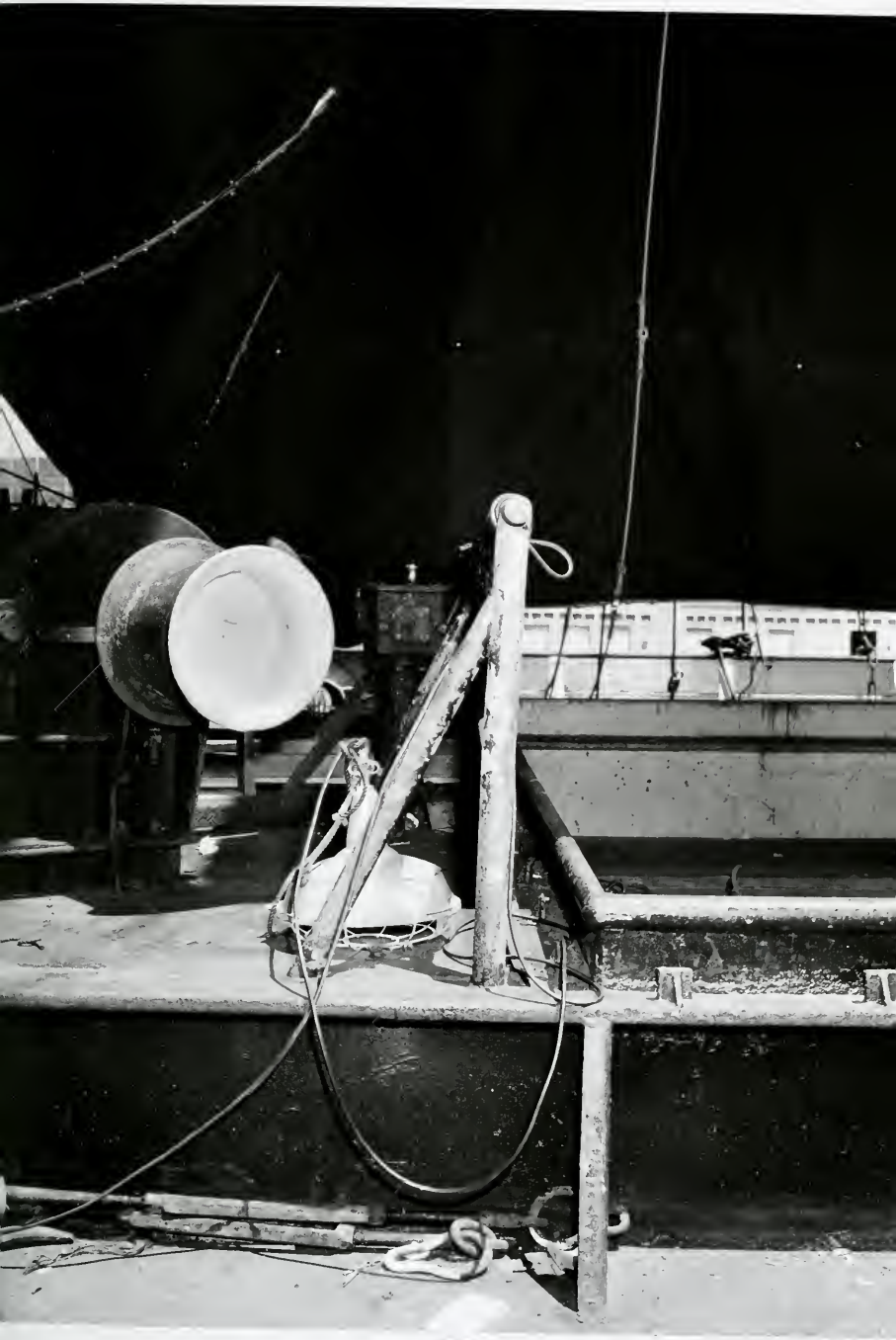
Attorneys for Appellant

(Exhibits follow)



Plaintiff's Exhibit 6